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Supreme Court of the United States

October Term, 1977

No. 77-1275

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the district court is reported at 418 F. Supp. 158 and is reproduced at pp. A8-A32 of the separately bound appendix to this petition ("App."). The opinion of the court of appeals is reported at — F.2d — and is reproduced at App. A33.

JURISDICTION.

The judgment of the court of appeals was entered on November 14, 1977 (App. A61). A timely petition for rehearing was denied on December 14, 1977 (App. A63). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Where a court of appeals concludes that a jury has properly found that defendants combined or conspired and injured one of the defendant's franchised dealers by their combined activities, may that court nevertheless grant judgment for the defendants N.O.V. on the sole ground that, because defendants gave valid business reasons for

their actions, ". . . the defendants' actions were not illegal under § 1 of the Sherman Act—*i.e.*, they did not constitute an unreasonable restraint" (App. 50)?

2. Is a jury justified in finding that a large automobile manufacturer unreasonably restrained trade in violation of § 1 of the Sherman Act when the manufacturer injured certain of its franchised privately-owned dealerships (PCs) by: (a) setting wholesale prices at levels for all of its dealers which were highly profitable to the manufacturer; (b) creating factory-owned retail dealerships (DEs) in the trading area of its franchised privately-owned dealerships; (c) causing those DEs to establish and maintain retail price levels which necessarily resulted in net losses or minimal profits from retail sales; (d) subsidizing, from manufacturing profits, the operations and operating losses of the DEs; and (e) failing to subsidize the operations of the PCs whose retail price levels are established by the operating practices of the DEs?

3. Can it be said that no "forward vertical integration" resulted from the manufacturer's policies, when a well-qualified expert testified that they would have that effect; when the manufacturer's figures showed that sales by factory controlled dealerships increased from 17 to 36 percent nationally and from 20 to 42.5 percent regionally over a seven year period while these policies were being implemented, and when the number of PC dealers in plaintiff's trade area declined dramatically then and at least one such dealer in addition to the plaintiff testified that his dealership was destroyed by the combination complained of?

STATUTE AND RULE INVOLVED.

This case involves Section 1 of the Sherman Antitrust Act (hereinafter "the Act"), 26 Stat. 209 as amended by 50 Stat. 693 and 69 Stat. 282, 15 U.S.C. Section 1, and Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Section 15. These statutes are printed in the statutory appendix to this petition at p. 46.

STATEMENT OF THE CASE.

Introduction.

A. The Jury's Verdict and the Plaintiff's Claims.

This petition seeks review of a decision of the United States Court of Appeals for the Third Circuit entering judgment for the defendants N.O.V. after the plaintiff, following a six-week trial, recovered a jury verdict of $1,300,000 on a Sherman Act, § 1, claim in the United States District Court for New Jersey. That verdict was trebled as required by law, judgment was entered, and post trial motions filed by the defendants were denied in the district court after the plaintiff filed a remittitur of $201,225 to correct an error of $67,075 in the jury's assessment of the plaintiff's damages. The jury's verdict consisted of specific findings that (1) all of the defendants were parties to a combination or conspiracy (2) which unreasonably restrained trade and commerce, and (3) that the combination or conspiracy was the proximate cause of damage to the plaintiff (4) in the sum which the jury awarded.

The jury's verdict was based on its acceptance of the plaintiff's basic contentions of fact.

Specifically, the plaintiff operated a privately capitalized (PC) Dodge dealership. Its primary claim was that, during its life, that dealership was damaged, and ultimately was destroyed, because of operating policies followed by a substantial number of factory controlled ("DE") Dodge dealers with which plaintiff was obliged to compete, together with direct subsidies and other types of favoritism shown these dealers by the defendant Chrysler Corporation and certain of its subsidiaries, which subsidies and support were not provided to plaintiff and other privately capitalized Dodge dealers in that trade area. These subsidies and other forms of support, plaintiff contended, made it possible for the DE dealers to sell new Dodge automobiles at prices which private capital dealers such as the plaintiff could not afford to meet. The widespread and price-

emphasizing advertising engaged in by these dealers effectively established the retail prices at which plaintiff could in fact sell its new automobiles, just as Chrysler Motors Corporation controlled the price at which plaintiff could buy new Dodges for resale. In other words, plaintiff contended that, throughout its life, its business was squeezed by the defendants and their factory controlled Dodge dealers, and eventually that its business was destroyed by their combined activities.

In addition, plaintiff contended that, in 1969 and 1970, when Chrysler sales and profits declined sharply nationally, the Chrysler defendants, together with certain of their DE dealers in southern New Jersey, took a series of actions whose actual purpose, as well as their effect, was to destroy the plaintiff's business in order to obtain for the competing DE dealers the sales formerly made by the plaintiff.

B. The Issues Raised by This Petition.

Section 1 of the Sherman Act declared "[e]very . . . combination, . . . or conspiracy in restraint of trade . . . to be illegal". Subsequently, our courts have limited that proscription to those combinations and conspiracies which "unreasonably" restrain trade. Since 1712, courts of common law have held that otherwise permissible restraints must be deemed unreasonable if the effect of the anti-competitive conduct is more than is minimally necessary to accomplish even a desirable and well-intentioned objective.

In 1974, a federal jury—properly instructed by an experienced trial judge on this precise point--considered the justifications advanced by Chrysler Corporation and its wholly-owned subsidiaries for their anti-competitive behavior vis-a-vis Chrysler's privately capitalized dealers. Significantly, the defendants presented no independent evidence that such conduct was required or even desirable in the defendants' quest for increased interbrand sales during the years at issue. Furthermore, and in any event, the jury, affirmed by the trial judge, found the defendants' conduct to be unreasonable under all the facts. The Third

Circuit conceded that the record supported the jury's findings that the plaintiff auto dealer was injured by various anti-competitive (at the dealer level) acts of the combined defendants (App. A45-A47, A50). Nevertheless, the court reversed the jury's verdict and held that the defendants' "good intentions," *i.e.,* their desire to obtain a larger share of the interbrand market, rendered this conduct reasonable as a matter of law, and this despite evidence that such conduct had resulted in the totally unnecessary destruction of the plaintiff and other small, independent dealers who retailed defendants' products exclusively, in competition principally with defendants' factory-owned stores.

The decision has been rendered in total disregard of the law applicable to such facts as promulgated by this Court and echoed by other courts of appeal.

If not reversed, the impact of the Third Circuit's decision in this case will extend far beyond the injuries which will continue to be inflicted on the remaining private capital dealers of the automotive industry's "Big Three". By approving, as a matter of law, the many predatory practices engaged in by the defendants, the instant decision will encourage the adoption of such practices in all of America's oligopolistic markets. On the other hand, a reversal of the instant decision will serve notice to America's oligopolies—the assets of some of which exceed the assets of most of the nations on earth—that further unnecessary concentration, accomplished by predatory means such as those used here, is unlawful and not in the national interest.

Furthermore, this decision is not an unfortunate, but isolated, judicial aberration on the part of the Court of Appeals for the Third Circuit. During the past fifteen (15) years, not one private antitrust damage award has survived in that circuit unscathed. In prior cases, the Third Circuit has reversed jury verdicts on the ground of admission of improper evidence, exclusion of proper evidence or rulings of law which it found to be incorrect. This is the first case in which none of those factors was present and none is

offered as the basis for judgment N.O.V. Here, we submit, the Third Circuit impermissably substituted its finding for that of the jury on the issue of the reasonableness of the defendants' conduct.

The court acted in mistaken reliance upon the opinion of Justice Brandeis in *Chicago Board of Trade v. United States,* 246 U.S. 231 (1918), when it concluded that it had the right to substitute for the jury's verdict its finding "of the role that the defendants' (sic) *intent or purpose* plays in the rule of reason test" (App. A53). The court totally ignored the fact that the Brandeis opinion was dealing with a district judge's refusal to consider the intent or purpose of the defendant, and in an antitrust injunction case where no jury was involved. This Court, then, was as able as the trial judge to determine the issue of reasonableness and did so on the record presented.

Now, in a different context, the Third Circuit has substituted its judgment for that of a jury after a full trial. The jury considered all the evidence as to the defendants' actions, as well as their claim of legitimate business purpose, and found that defendants' conduct constituted an unreasonable restraint. While the court of appeals was persuaded that Chrysler had impelling business reasons for seeking to improve its market position and for creating new dealerships to that end—a proposition we need not dispute—its opinion ignores the critical consideration that this objective neither required nor justified sharp and destructive discriminations against existing franchisees who had invested substantial capital in their representation of Chrysler.[1] As the district judge pointedly observed (App. 22), and as the jury doubtless found, the objective of increasing "Chrysler's competitiveness on the interbrand level" could

1. As the Court is aware, Congress has expressly recognized the substantiality of dealer investments in their franchises and the vulnerability of these dealers to coercion by automobile manufacturers. Automobile Dealer Franchise Act of 1956, 15 U.S.C. 1221 *et seq.* These interests are no less endangered where the dealer is forced out of business by economic measures adopted by the manufacturer than where there is a termination of the franchise in bad faith.

have been "effectively pursued had the financial and other assistance which the defendant provided DE dealers been extended to independent dealers as well." Such assistance was refused; beyond that, here as in other cases, as the district judge stated (App. A19), there was evidence "that the Chrysler-financed dealerships engaged in predatory practices to eliminate independent competitors . . ."

The Brandeis Court consistently recognized that in an antitrust case tried to the jury the evaluations of purpose and conduct and the inferences to be drawn therefrom are for the jury. Thus, in *Thomsen v. Cayser,* 243 U.S. 66 (1917), a court of appeals had entered judgment for the defendant N.O.V. on the basis of the defendant's good intentions, after a jury found that the defendant's actions restrained trade unreasonably. The Court said:

> "The argument that is employed *** is one that has been addressed to this court in all of the cases. *** It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial, not a detrimental agency of commerce.
>
> "*** a combination is not excused because it was induced by good motives or produced good results ***." 243 U.S. 86.

See, also, in accord, *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972).

Plaintiff does not suggest sinister purpose or improper conduct on the part of the Third Circuit. It is the judgment, not the good intention, of the court which is in question. The judgment here follows a long line of cases where, for one reason or another, the Third Circuit, while iterating all the principles of law concerning illegal restrain of trade, has wiped out every large damage award in private antitrust actions.

Private antitrust actions are the cornerstone of effective antitrust enforcement. In the highly concentrated and indus-

trial area which the Third Circuit serves, fewer and fewer qualified counsel are willing to undertake the complex, time-consuming effort required to represent a single prospective plaintiff in a private antitrust action regardless of the merits of the plaintiff's cause. On the other hand, large corporate defendants have come to recognize that they need not alter predatory conduct, nor consider any compromise, for, regardless of the record below, history continues to comfort them with the likelihood of ultimate success on appeal.

Here, plaintiff and experienced counsel developed an unusually strong and detailed liability case, demonstrating in particular the predatory nature of defendants' activities with the defendants' own records and the testimony of the defendants' own witnesses, from the chief executives on down. Similarly, great care was taken to present the damage portion of plaintiff's case conservatively, by having existing records analyzed by a highly-qualified and national respected expert. Thereafter, a jury, whose actions in so doing were approved by an experienced trial judge, assessed the defendants with liability on the basis of such evidence. Now, however, the efforts of all have come to nought.

This case presents the Court with an important opportunity: (a) to approve the jury's condemnation of predatory trade practices used in many markets to increase the sales of large manufacturers at the expense of their own dealers; (b) to check a particularly important court of appeals in its prolonged frustration of enforcement of the antitrust laws by private damage actions, and (c) to reaffirm the congressional goals embodied in those statutes.

• • • •

I. The Factual Background

A. The Plaintiff.

The Plaintiff, Martin B. Glauser Dodge Co. ("Glauser Dodge"), is a New Jersey corporation which, between 1964

and 1970, sold and serviced new Dodge automobiles and trucks in Vineland, New Jersey, pursuant to a franchise agreement with Chrysler Motors Corporation. The stockholders of Glauser Dodge are the widow and four sons of its founder, all of whom worked in the business.

Vineland is a low density municipality located in Southern New Jersey, midway between Camden and the shore-points. Its trading area, according to a Chrysler appraisal, extends over the entire southern end of New Jersey into the Camden-Trenton area. This area, in turn, was part of what Chrysler denominated its "Philadelphia-Metro" region, which included the City of Philadelphia and counties surrounding it on both sides of the Delaware River.

B. Chrysler, Chrysler Motors, and Their DE Program.

The defendant Chrysler Corporation is a holding company which, through subsidiaries and divisions, manufactures, distributes, and sells motor vehicles. According to Chrysler's 1969 Annual Report to stockholders—that which immediately preceded the destruction of plaintiff's business in July of 1970 and the filing of this law suit the following month, the net sales of Chrysler Corporation and its consolidated subsidiaries for 1969 exceeded Seven Billion Dollars.

The defendant Chrysler Motors Corporation is a wholly owned subsidiary of Chrysler Corporation which manufactures and sells various brand name automobiles and trucks, including those with the brand name Dodge, through thousands of dealers with whom it has executed franchise agreements. From 1964, the year Glauser Dodge began business, until 1972, the sales of Chrysler Motors varied from between a low of 1.12 Billion Dollars to a high of a 2.49 Billion Dollars, and its annual profits, before taxes, averaged 16⅝ percent of the stockholders' investment.

In 1961, after Chrysler's share of the American automobile market had declined from 22 to 11 percent over a five year period and Chrysler Motors was using only 55 percent of its manufacturing capacity, Chrysler adopted a "Market

Representation Program" designed to improve its seriously deteriorating marketing strength to the point where Chrysler could bring its sales up to its then manufacturing capacity of 1.3 million units.

Pursuant to recommendations of a Chrysler executive memorialized in a so called "Quinn Memorandum", Chrysler determined that "venture capital" was required to revitalize Chrysler's dealership system, that most of this capital would have to be provided by Chrysler, and that use of the following devices, among others, was required:

(1) Mortgage on existing facilities;

(2) Sponsorship of capital loan program through financial companies, for which Chrysler would assume partial responsibility;

(3) Acquisition of existing facilities and lease to operator;

(4) Assumption of lease or guaranty of lease on existing facilities or facilities to be built; and

(5) Use of a contractual start-up plan in relation to the assumption of operating losses by Chrysler Corporation for a specified period,

"•••operator to be employed by wholly-owned subsidiary dealership corporation at salary plus incentive bonus expressed as percentage of profit before rent with option to buy shares at par•••."

The program by which Chrysler chose to carry out these objectives was known as the Dealer Enterprise ("DE") Program, and the subsidiary dealerships became known as DE dealers. Initially, Chrysler targeted 300 of 450 "open points"[2] to be filled by DE dealers; Chrysler also estimated that facility support in the order of $400,000 each would be required in 50 percent of these cases; that 75 percent of the

2. An "open point" is a location from which Chrysler desired to sell automobiles but at which it did not have a dealer.

new operations would be financed by Dealer Enterprise at an average cost of $100,000 each, and that launching costs—estimated to average $50,000 each—would be required with respect to 50 percent of the new dealerships "by utilization of the subsidiary company—option to purchase device."

The adoption and implementation of the Dealer Enterprise Program produced a dramatic improvement in Chrysler unit sales, operating results and earnings through 1968. The figures appear in columns 8 and 9 of a trial exhibit reproduced in the Appendix (at A5). These figures establish that, by 1964, the year Glauser Dodge commenced business, Chrysler's unit sales exceeded substantially its 1961 productive capacity of 1.3 million units, and that Chrysler's earnings had increased from 65 million to 291 million dollars. In its 1968 Annual Report to stockholders, Chrysler stated that, in that year, Chrysler had "•••fulfilled the objectives established when the greatest expansion program in (Chrysler) history was undertaken five years ago." In a deposition given in this case in 1971, Chrysler's president testified that Chrysler assembly plants had been working at capacity for a number of years prior to 1971.

Nevertheless, as the trial exhibit reproduced at p. A1 of the Appendix shows, Chrysler's Dealer Enterprise Program continued to operate after 1968, and on an expanded scale, even though, with the exception of an eleven month period in 1964 and during 1968, the program produced net operating losses for the years 1964 through 1970.[3] During

3. This schedule is also supplemented with information as to Chrysler's original investment—"Amount Required to Buy Out/Convert" and figures for a 14% return before taxes on such an investment which, according to plaintiff's economist, was what a competing private capital dealer would have earn in order to realize a return of only 8% of his investment. The "Amount Required to Buy Out/Convert" figures do not reflect that, in many cases, Chrysler's investment in the dealership increased from year to year by reason of additional sums which Chrysler Motors invested to make up for annual operating losses sustained by these dealers. Neither do the figures reflect the financial support which the dealers obtained from Chrysler Credit, Chrysler Financial and Chrysler Realty (see pages 12-14, *infra*.)

this same period, the number of dealerships subsidized by the program increased rapidly, as did the percentage of Dodge sales by DE dealers and those (usually former DE's) operating in Chrysler owned facilities. Specifically, these sales increased from 17.4 percent of all new Dodge sales in 1964 to 36.1 percent in 1970. The reason Chrysler increased its investment in the Dodge DE program notwithstanding the operating losses which it produced was that those losses were more than offset by increased profits at the manufacturing level generated by the lower unit cost of manufacturing which resulted from the better utilization of Chrysler's plant as sales increased.

The same loss pattern established by the national figures was reflected in the results of Dodge DE dealers in the Philadelphia-Metro region—including plaintiff's direct DE competitors, Crescent, Cherry Hill, Cinnaminson, and Black Horse Dodge (App. A2-A3) and in the results of the South Jersey Dodge DE dealers alone (App. A4). Chrysler figures also establish that between 1964 and 1972, sales of new Dodges by Dodge DE and former DE dealers in South Jersey increased from 20% to 42.5% of all sales of new Dodges in that area.

C. Chrysler Credit, Chrysler Financial, and Chrysler Realty.

The defendant Chrysler Financial Corporation is a wholly owned subsidiary of Chrysler Corporation and the capital source for the entire Chrysler financial complex. Admittedly, Chrysler Financial and its subsidiaries form a part of the marketing function of the sale and distribution of Chrysler automobiles. Chrysler Financial, in addition to obtaining money from its parent, acquires money from the public by selling commercial paper.

The defendant Chrysler Credit Corporation is a wholly-owned subsidiary of Chrysler Financial Corporation and provides wholesale credit to Chrysler dealers and retail credit to their customers.

During much of the period complained of, Chrysler Credit financed purchases of new Dodge automobiles from Chrysler Motors by the South Jersey DE dealers as well as Glauser Dodge; Chrysler Credit also purchased retail installment paper from Chrysler's private capital dealers such as Glauser Dodge, requiring them to guarantee such paper for 90 days after a default, whereas the competing DE dealers in Southern New Jersey could sell their retail paper to Chrysler Credit on a "without recourse basis", notwithstanding Chrysler Credit's loss of large sums on the resale of each repossessed vehicle.

Chrysler Motors made payments to Chrysler Financial in exchange for Chrysler Financial's support of Chrysler Motors DE program. These payments assured Chrysler Financial of earnings, which in turn made its notes attractive to outside investors.

As another trial exhibit (App. A5) establishes, Chrysler Credit and Chrysler Financial, exclusive of these subsidies, showed a steady deterioration in operating results from an initial profit of $184,000 in 1966 to a loss of $6,000,000 in 1970. The poor operating results and/or losses stemmed primarily from Chrysler Credit's purchase of retail installment paper from Chrysler dealers, including permitting DE's to be "out of trust"[4] for months at a time and purchasing installment paper from DE's on a without recourse basis. Notwithstanding, Chrysler's direct investments in its finance companies increased from $110 to $294 Million during the period in question (App. A5).

The defendant Chrysler Realty Corporation is a wholly-owned subsidiary of Chrysler Corporation formed in 1967. Chrysler Realty's primary responsibilities are to administer automotive properties, develop new dealer facilities, assist in upgrading existing facilities, and acquire sites for future dealerships.

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4. A dealer is "out of trust" when, having sold a vehicle financed for it by another pursuant to a trust agreement, it fails to repay the loan as soon as the financed vehicle is sold.

When Chrysler Realty was formed, Chrysler Motors transferred dealership assets which it already owned to Chrysler Realty in exchange for stock and notes. These notes bear interest at 6 percent even though, during much of the period involved in this case, Chrysler Corporation itself paid substantially more than 6 percent for the monies which it borrowed.

Chrysler Realty was formed as a device to obtain separate capital from the public—by selling notes—to subsidize Chrysler's DE program. Funds could be obtained in this way on terms superior to those on which a private capital dealer could ordinarily obtain funding for facilities. In order to assist Chrysler Realty Corporation in selling the public its notes, Chrysler Corporation guaranteed those notes.

A substantial portion of Chrysler Realty income is derived from rent received from the parent company for "dealer property under development". Other income is derived pursuant to an agreement under which Chrysler Motors pays "service fees" to Chrysler Realty while dealer property is under development. Additionally, in 1969-1970, Chrysler Realty received substantial capital contributions from its parent.

Chrysler Realty leased premises to DE dealers who competed with Glauser Dodge for sums equal to the interest which Chrysler Realty paid for the money which it borrowed to build the facilities, and this practice was continued when a DE dealer "bought out" but continued to occupy the premises as a Chrysler dealer. The "rent" did not cover items such as development costs, depreciation, profit, or amortization of underlying indebtedness, as would the rent of a privately capitalized dealer.

Another trial exhibit (App. A6) shows that, if the contributions from its parent corporation and Chrysler Motors were subtracted from the before-tax earnings of Chrysler Realty for the years through 1970, Chrysler Realty lost more and more every year and, most notably, lost $4,000,000 in 1972 alone. Nevertheless, as with Chrysler Financial, Chrysler's investment in Chrysler Realty increased each year. Also, the number of dealer facilities owned or leased by Chrysler Realty increased at the rate of 50 facilities per year from more than 500 in 1967 to more than 733 in 1972.

D. The General Effect of The DE Program On Dodge Dealers In South Jersey.

A Financial and General Fact Book of Chrysler Motors Corporation, published in July of 1968, stated:

> "Each year since 1962, Chrysler Corporation has gained a greater competitive share of the expanding automotive market in the United States. Unit sales have more than doubled during this period and in the first six months of 1968, the company's market share rose to 18.4 percent compared with 10.3 percent for 1962."
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> • • • • •
>
> "**** The conquest rate which is an indicator of the company's growth in obtaining new owners from among those who previously owned competitive makes has risen from 13 percent to 30 percent since 1962".[5]

As the figures (App. A4) show, the DE dealers in Southern New Jersey, collectively, operated at a loss until 1970, but their sales steadily increased. Low retail prices established by the DE dealers were among the keys to this sales success. In 1965 and 1966, Cherry Hill Dodge retailed new automobiles at prices ranging from their factory invoice prices to $50-$125 above. In August, 1966, at the instruction of a Dodge official, a Dodge DE dealer ran full page ads in *The Philadelphia Bulletin* advertising new Dodge automobiles at their factory invoice prices and inviting potential customers

5. The "conquest rate" is very important to an automobile manufacturer, since Chrysler statistics also show that in 1968 at least 75 percent of Dodge sales were repeat sales.

to inspect the factory invoices themselves. Approximately 196 Dodges were sold over one weekend as a result. This type of price-cutting and high-pressure advertising continued throughout Glauser Dodge's history. Chrysler records show that, in 1969, the average gross profit per new unit sold by Cherry Hill Dodge was $245, or $30 per unit under the group average against which Cherry Hill's sales were measured. That same year, the average gross profit per unit of Cinnaminson Dodge, another DE dealer, was $59 per unit below the average of its group. A third South Jersey DE dealer, Black Horse Dodge, was only $10 below its group average in 1969, and Black Horse made a profit that year; whereas the other two did not. In 1970, the year Glauser Dodge was put out of business, the average of the dealer group with which the results of Cherry Hill and Black Horse Dodge were compared went up—from $267 to $279, whereas Cherry Hill's gross profit per unit declined from $245 to $233, and Black Horse's margin dropped from $267 to $228. At the same time, Black Horse, which made $101,000 in 1969, lost $76,000 in 1970.

Another trial exhibit, which is the basis for the chart reproduced at App. A7, establishes that, during 1969 (when plaintiff's gross profit margins were still controlled by Chrysler Motors on the cost side and Cherry Hill Dodge and other DE dealers on the retail sales side), the maximum immediate [6] cash return above wholesale cost which Cherry Hill Dodge could have obtained for the sale of each new Dodge automobile was less than $61 per vehicle.

In addition to imposing on them unrealistic profit margins, many forms of discrimination by Chrysler against Dodge PC dealers were shown to have existed in the South Jersey area during the relevant period. For example, Chrysler Credit refused to purchase retail installment contracts from the customers of PC dealers, including Glauser, without recourse ("WOR") and required Glauser to underwrite (and

6. From time to time, dealers could increase their gross profit margins by earning bonuses in sales contents; they also received a "holdback" at year end from the manufacturer.

its shareholders to act as guarantors of) all retail installment contracts sold to Chrysler Credit. Each repossession produced a substantial loss and a constriction of Glauser's cash. Meanwhile, competitive DE's in the same market sold their retail installment contracts to Chrysler Credit without recourse even though, admittedly, Chrysler Credit used the same standards in evaluating all retail paper, and in disposing of the DE's repossessions, Chrysler Credit lost approximately $1,200 per vehicle.

Repossession losses were not the only damage directly resulting to Glauser Dodge from this discrimination. To ensure that Glauser would pay to repurchase its repossessions, Chrysler Credit withheld substantial sums of money—as much as $35,000 to $40,000 at times—in non-interest bearing reserves and refused to release these reserves even when they were desperately needed. The only reserves required of competing DE dealers were $1,000 each.

Other forms of discrimination established by the evidence are outlined *infra* (at pp. 22-23).

In 1964, there were private capital Dodge dealers at 33 points in Southern New Jersey; by 1972, there were no such dealers at 11 of these points; meanwhile, as noted before, the percentage of Dodge sales made by the DE Dodge dealers increased from 20 percent in 1964 to 42.5 percent in 1972. The proprietor of one of those other PC dealers was a witness for Glauser Dodge. He, too, testified that he could not compete because of limitations on his wholesale line of credit and demands for full recourse paper imposed by Chrysler Credit, sales by DE dealers at prices $50 to $75 over direct cost, and favoritism shown DE dealers in Chrysler advertising support.

E. Glauser Dodge Operations—February 1964, to May, 1969.

Glauser Dodge, from the standpoint of sales, was quite successful from its inception in February, 1964, until the fall of 1969, and it also earned modest profits. Although originally programmed by Chrysler to sell approximately 112 new

vehicles per year, Glauser Dodge continuously exceeded its minimum sales requirement by more than 200 percent—admittedly, a very unusual fact—and almost immediately became and remained the largest privately capitalized Dodge dealer in Southern New Jersey.

During this period, Glauser Dodge expanded its operations from one to three facilities and, in December, 1968, commenced construction of its own, new, consolidated facility. That facility was completed in September, 1969, at a cost to Glauser Dodge of $315,000, of which $260,000 was provided by a local bank on a loan participated in by the Small Business Administration and guaranteed by Mrs. Glauser, her four sons and the wives of the three who were married. In all, the Glauser family, using, among other things, the proceeds from insurance on the life of Martin Glauser, invested $25,000 in stock and $186,000 in loans to the dealership prior to May 1, 1969, and invested an additional $125,000 in the business subsequent to that date.

The esteem with which the management of Glauser Dodge was held during this period by Chrysler officials in the area is apparent from favorable comments made on this subject in a long series of Chrysler documents. Also, each and every step which the Glausers took to acquire the land for and build their new facility was cleared in advance and approved by local Chrysler officials.

When completed, Glauser Dodge's new facility was comparable to the elaborate show places which Chrysler Realty had provided for the three Dodge DE dealers then operated in Southern New Jersey, except that the Glauser facility cost less to build.

F. The Demise of Glauser Dodge May 1, 1969—July 3, 1970.[7]

As noted before (at pp. 10-11), the author of the Dealer Enterprise Program had suggested that, before establishing

7. One basis on which the court of appeals justified its decision was the assertion (App. A57) that there was no evidence that could

factory dealerships in a particular area, Chrysler should attempt to assist the private capital dealers there by alternatives such as the purchase and lease back to dealers of retail facilities, the guarantee of dealer leaseholds, and capital loans. Furthermore, the theory of the Dealer Enterprise Program was that, in time, such dealerships would produce enough earnings to permit the manager to buy out Chrysler, in which event, Chrysler would be free to use the funds recovered to invest in a similar dealership some place else.

When Glauser Dodge opened its large new facility in September, 1969, it was competing with three Dodge DE dealers in South Jersey[8] and through 1968, only one of these dealerships had ever operated at any profit (App. A4), and only one was selling substantially more new Dodges than was Glauser Dodge.

Chrysler's profits dropped $200 Million in 1969 and, during the summer and fall of 1969, these DE's intensified their advertising and price-cutting competition with Glauser Dodge. On 1970 Model Announcement Day, which coincided with the opening of Glauser's brand new facility, Chrysler Motors delivered Glauser Dodge no new Dodges, whereas each DE was amply supplied. At the same time, Chrysler Credit brought many more repossessions to Glauser Dodge for repurchase and demanded immediate repayment when vehicles subject to wholesale financing agreements were sold by Glauser. As a consequence of these pressures, Glauser Dodge lost sales and was confronted by cash flow shortages. Repeatedly, Glauser Dodge sought to obtain from Chrysler each of the types of dealer assistance which the Quinn Memo-

7. (Cont'd.)
have justified the jury in concluding that the defendants ever intended to put Glauser-Dodge out of business. That statement should be compared with the facts recited below.

8. Two of these DE dealerships were located within 25 to 40 minutes driving time of Glauser Dodge. All of the DE's advertised heavily, some in the same newspapers as Glauser Dodge. Glauser advertised on a radio station near Cherry Hill Dodge and Black Horse advertised heavily on a radio station whose beam was directed to and heard by residents in the vicinity of Vineland.

randum (pp. 10-11 *supra*) stated should be offered PC dealers, received recommendations from local Chrysler personnel that such relief be granted, but was turned down in Detroit. The final request for relief was rejected for the stated reason that Glauser Dodge was (and always had been, for that matter) selling three times as many cars as it was supposed to be selling in the area in which it did business.

Over the Fourth of July weekend in 1970, after one of the Dodge DE managers in South Jersey secured outside capital to buy control of his dealership in June, Chrysler Credit seized all of Glauser Dodge's inventory and sold it, privately, without proper notice, and at a very substantial loss, to a Chrysler DE dealer. This ended Glauser Dodge's business.

Thereafter, Chrysler Credit substantially increased the wholesale credit made available to all the competing DE dealers, a Chrysler executive purchased control of a nearby private capital dealership, the DE dealers immediately increased their sales in 1970 by approximately the same number of vehicles Glauser had sold in 1969, and the new PC dealer increased his sales, too.

On the other hand, Chrysler did not place a new dealer in Vineland for three years, *i.e.*, not until all the DE dealers had "bought out", even though, one month before Glauser's business was destroyed, Chrysler's district sales manager had written that Chrysler intended to have a Dodge dealer in Vineland for at least fifteen years.

II. The Proceedings Below.

A. The District Court.

This case was tried before Honorable Mitchell A. Cohen. Judge Cohen is and was the senior district judge in the State of New Jersey.

Plaintiff presented its case primarily through Chrysler records and ten Chrysler witnesses. The latter ranged from

the chief executive officers of the various Chrysler defendants to the Collection Supervisor in Chrysler Credit's Cherry Hill branch office. Three of Martin Glauser's sons and other witnesses also testified and produced the plaintiff's relevant records. Also, to compute plaintiff's damages, and to provide testimony concerning the unreasonableness of the defendant's marketing practices and their probable effect on private capital dealers, plaintiff presented Dr. Albert H. Kuehn. Dr. Kuehn is a nationally recognized economist and marketing expert who has served as a consultant to the Antitrust Division of the United States Department of Justice.

As originally filed, plaintiff's complaint included claims for attempting to monopolize the retail sale of Dodge automobiles and of price discrimination under the Robinson-Patman Act. However, since the evidence was largely duplicative and plaintiff's counsel desired to simplify the issues to the jury, they voluntarily proposed and agreed, at the conclusion of the evidence, to have dismissals entered as to all but the Sherman 1 claim, and stipulated to the amount of a Chrysler Credit counterclaim.

In his closing address to the jury, counsel for defendants argued, in effect, that the Chrysler defendants were constrained to do what they did because of interbrand retail competition from General Motors and Ford. Although there was absolutely no independent evidence to support this position, Judge Cohen instructed the jury to weigh Chrysler's contention:

> "In determining whether or not a particular combination or conspiracy did or did not restrain trade unreasonably, one of the factors you should consider is the business or economic reasons which may have motivated the defendants' course of action. However, if *after* considering this you nevertheless conclude that the effect of the defendants' action was to unreasonably restrain trade, then you should find that the combination or conspiracy was unlawful, and *in that event*, it would be no defense

that defendants' motives were good or that they thought they had good business reasons for doing what they did."

The jury decided specifically that the combination and/or conspiracy complained of unreasonably restrained trade (App. A13), and the damages award made by the jury was at the lower edge of the various damage projections offered by plaintiff's experts. While quite substantial, it did no more than put the Glauser family in a position to repay what was owed to Chrysler Credit, honor Glauser Dodge's other debts (including the one to the Small Business Administration), and recover their investment.

In his opinion denying Chrysler's post trial motions, Judge Cohen stated (App. A13):

> "The essence of plaintiff's antitrust claim is that the Dealer Enterprise marketing program operated in a discriminatory fashion vis a vis private capital dealers. There was evidence adduced at trial to show that: (1) Cars were advertised and sold through DE dealers at prices which were lower than private capital dealers, such as the plaintiff, could afford to charge. (2) Superior physical facilities were provided to DE dealers on terms which were not available to competing private capital dealers. (3) DE dealers were permitted to sell retail installment contracts to Chrysler Credit Corporation on a without recourse basis, whereas plaintiff was required to guarantee to repurchase defaulted retail installment contracts of its customers, (4) DE dealers were permitted to operate in an out-of-trust condition when experiencing cash flow problems, whereas plaintiff's credit was immediately revoked when it was out of trust. (5) Restrictions on plaintiff's wholesale lines of credit, as well as its inability to sell its commercial retail paper without recourse, precluded plaintiff from participating in revenue-producing sales contests to the same degree as DE dealers. (6) Plaintiff did not receive the new vehicles it had ordered for its 1969 opening, even though an ample number of such vehicles were delivered to the DE dealers in the Camden area."

Emphasizing in particular two prior decisions of the Court of Appeals for the Third Circuit and one district court decision of which that court had approved (see p. 35 *infra*), Judge Cohen held that the foregoing features of the defendants' DE program raised questions under the Act resolvable only by a jury (App. A18-A19).

In answer to the defendants' argument that they should be absolved from accountability because their purpose was to increase competition at a higher level, Judge Cohen pointed out, citing this Court's decision in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), that there was no justification for violating the Act in one particular market in order to further competition in a larger, more important market. He also said (App. A22):

> "In any event, defendants' desire to increase Chrysler's competitiveness on the interbrand level does not explain the reasonableness of their conduct. Indeed, this goal could have been more effectively pursued had the financial and other assistance which the defendants provided DE dealers been extended to independent dealers as well".

B. The Court of Appeals.

Before the court of appeals, this case was heard by Judges Gibbons, Weis and Garth, of whom only Judge Weis had participated in the earlier decisions of the court of appeals involving automobile dealerships cited in Judge Cohen's opinion. The panel conceded (App. A45-A47) that there was evidence of the price cutting and all of the discriminations which Judge Cohen held supported the jury's findings of a conspiracy or combination among the defendants which unreasonably restrained trade. However, the panel held (App. A56) that the defendants were entitled to judgment

N.O.V. because the evidence also showed that Chrysler had adopted the Dealer Enterprise Program for valid business purposes, *i.e.*, to increase retail sales and to strengthen its dealership system. The most recent Third Circuit decision cited by Judge Cohen, *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (1974), was distinguished on the ground that, while the case involved the same Dodge DE program of which plaintiff complained, that case was based on a complaint which included a specific charge that Chrysler intended, by its conduct, to achieve a Dodge sales structure composed primarily of large Chrysler-owned dealerships (App. A54). The panel also said (App. A57, A58, A60) that it could find no evidence in the record in this case that the actual effect of the Dodge DE program was forward vertical integration by Chrysler, or that the defendant ever actually intended to destroy Glauser Dodge.

Finally, the panel noted that (App. A58), to the extent Glauser Dodge claimed an injury based solely on subsidies which the DE dealers received but Glauser Dodge did not receive, Glauser Dodge's claim was foreclosed by another Third Circuit decision, *Rea v. Ford Motor Co.*, 497 F.2d 577, 590, *cert. denied*, 419 U.S. 868 (1974).

The specific ground on which the court of appeals based its entry of judgment, *i.e.* absence of vertical integration, had not been raised by the defendants at trial, in their post trial motions below, or even in their appellate briefs as a basis for directing a verdict or for entering a judgment N.O.V. Nor had such a theory for the entry of judgment been mentioned by anyone at oral argument on appeal. Accordingly, plaintiff sought rehearing by the panel and, in view of the panel's treatment of the court of appeals' earlier decisions in this area, rehearing before the full court. However, unless one member of the panel which hears a case votes for rehearing by the panel or a majority of the entire court votes for rehearing in banc, such petitions are denied.

That is what happened here.

REASONS FOR GRANTING THE WRIT.

I. In Entering Judgment for the Defendants N.O.V., the Court of Appeals Departed Significantly From Principles of Substantive Law Promulgated by This Court, and Interpreted the Antitrust Laws In a Manner Which, if the Decision Is Permitted to Stand, Will Have a Far Reaching and Very Adverse Effect on Private Enforcement of the Antitrust Laws in the Automobile and Many Other Oligopolistic Industries.

Chrysler Corporation is one of three huge manufacturers which dominate one of the nation's most important and most oligopolistic industries, the manufacture and sale of motor vehicles.[9]

9. *See* Note, *Vertical Integration In The Automobile Industry*, 17 B. C. Industrial and Com. L. R. 871-894 (1976). Among other things, the author points out (p. 875) that, between 1962 and 1968, "the Big Three's" aggregate share of the new vehicle registrations averaged 88.24% and that (p. 877), together, these manufacturers supply approximately 97% of the industry's domestic production. She also states, with annotations to supporting authority (at pp. 876-78):

> "***while a certain amount of concentration may be necessary to foster economic efficiency and progress, it has become increasingly clear that the Big Three have reached a level of concentration exceeding that which is required for optimum efficiency. Such excessive concentration is increasingly being regarded as harmful, rather than helpful, to competition. The Supreme Court, Congress and commentators have each indicated an awareness of the anticompetitive effects of high concentration.***
>
> An Oligopoly, which is broadly defined as a market controlled by a few manufacturers who impose high barriers to the entry of new competitors, is generally the result of intentional business conduct rather than purely fortuitous events.***
>
> The high degree of concentration that characterizes on oligopoly such as the automobile industry serves to destroy any actual competition among the few firms which comprise the oligopoly. High market concentration and entry barriers foster price fixing and other types of interdependent behavior. Specifically, high concentration undermines independent decisions by the firms with respect to prices and levels of production, thereby engendering a

Historically, as the court of appeals itself noted (App. A37-A38), retail sales in the automobile industry have been made by tens of thousands of independent dealers, but, more recently, the number of dealers has declined sharply, and manufacturers have assumed a greater and greater role in retail sales of their products by establishing factory controlled dealerships. In many areas, these dealers compete directly with privately capitalized dealers franchised by the manufacturer.

In the present case, a privately capitalized Dodge dealer has complained, and a jury has found as fact, that the dealer's business was damaged and ultimately destroyed by the actions of Chrysler and certain of its subsidiaries in establishing a group of factory controlled Dodge dealerships, causing these dealerships to establish retail price levels and gross profit margins at which privately capitalized dealers such as the plaintiff could not afford to compete, and using manufacturing profits generated by the increased sales produced as a consequence of these actions to subsidize the operations of the factory controlled dealers with a panoply of devices which the manufacturers did not offer to the competing private capital dealers.

The inevitable effect of these practices, as the record clearly shows, has been increasing forward integration of Chrysler into the retail sales market for Dodge automobiles

9. (Cont'd.)
disregard for price and product competition in favor of restricting production and inflated prices.

Measured by reference to the factors of concentration and barriers to entry, the automobile industry is one of the most anticompetitive industries in America; concentration is maintained at a level which is twice that considered repugnant to competition.***

A number of proposals have been advanced with respect to the manner in which the anticompetitive characteristics of the interbrand automobile market could be reached and regulated. ***One proposal which has particular significance for purposes of this discussion is that suit be brought under the Sherman Act to force the manufacturers to surrender their vertical control of the automobile distribution system. The theory underlying this third proposal is that an increase in the number of independent dealers selling a particular brand of automobiles in a given geographical area will increase competition at the interbrand retail level.***"

and the destruction of a substantial number of individual private Dodge dealerships in South Jersey alone.

Yet, in this case, the court of appeals has overturned the jury's verdict and judgment entered on the same by the very experienced judge who presided at the trial on the ground that the defendants' conduct was reasonable *as a matter of law* because the manufacturer intended as a consequence to increase its products' already quite significant share of the domestic motor vehicle market, and because *some* operators of factory controlled dealerships eventually bought the controlling stock in their dealerships and so, allegedly, became "independent". (Actually, the South Jersey DE managers who "bought out" continued to operate in Chrysler subsidized facilities under leases which will terminate if they cease selling Chrysler products; also Chrysler itself (App. A1) continues to classify such dealers as part of its Dealer Enterprise Program.)

Complete vertical integration in whatever share of the retail market for the sale of its products the manufacturer has an interest, and largely at the expense of the privately capitalized dealers, will be the inevitable effect of permitting the instant decision to stand. Furthermore, since the types of subsidies and factory support complained of here are not uncommon in other important industries, granting imprimatur as a matter of law to them will likely have the same effect there.

The principles of substantive and procedural law which the court of appeals chose to ignore in this case were previously thought to be well settled. In *Eastman Co. v. Southern Photo Co.*, 273 U.S. 359 (1927), the evidence showed that, after Eastman chose to commence distributing it products directly to customers who were, or had been, customers of its dealers, Eastman also refused to grant those dealers discounts as it had previously done. This Court held that a proper basis in fact existed for assessing Eastman with liability under the antitrust laws, and this notwithstanding the fact that Eastman professed to have valid business reasons for its conduct. The Court also held (273 U.S. at 375) that

whether or not liability should be assessed in such a case was "***exclusively a question for the jury; its determination is conclusive upon this question of fact."

In *Poller v. Columbia Broadcasting System,* 368 U.S. 464 (1962), this Court considered the antitrust issues implicit in the following situation: the plaintiff operated a UHF television station in Milwaukee which originally was affiliated with the Columbia Broadcasting System. Then CBS acquired another UHF station in Milwaukee and cancelled its affiliation with plaintiff. At this point, plaintiff's business became unprofitable, and when its assets were liquidated, the purchaser, at a distress price, was the plaintiff's CBS-owned competitor. The lower courts entered and affirmed summary judgment for the defendant on plaintiff's antitrust claim, primarily because they concluded that there was no evidence that the public had been injured as a result of the defendant's conduct. This Court reversed, saying (369 U.S. at 473):

> "To the extent that this argument suggests that there is no violation of the antitrust laws because the public will still receive the same service, it has been foreclosed by this court's decision in *Klor's v. Broadway Hale Stores,* 359 U.S. 207 (1959)."

The Court also emphasized (368 U.S. at 473) that, in cases such as this, "***where motive and intent play leading roles, the proof is largely in the hands of the alleged competitors, and hostile witnesses thicken the plot ***(there) is no substitute for trial by jury which so long has been the hallmark of even handed justice."

The specific factual conduct of which Glauser Dodge complained is not identical to that complained of by the plaintiffs in cases such as *Eastman, Poller,* and *Klor's,* but the legal principles involved are precisely the same. Although those cases involved charges of monopoly or attempted monopoly, the jury in the present case had the right to find that the defendants had combined or conspired in ways which produced a monopolistic effect, since an agreement to monopolize or to

attempt to do so is, *ipso facto,* an agreement to restrain trade unreasonably. It was for this reason that, as plaintiff's counsel, we decided to have the Section 1 claim alone submitted to the jury.

Furthermore, the conduct and business consequences disapproved by the jury here are very similar to those which Chief Justice (then Circuit Judge) Burger condemned in *Reynolds Metal Company v. F.T.C.,* 309 F.2d 223 (D.C. Cir. 1962). Judge Burger sustained an F.T.C. order directing Reynolds Metal Company to divest itself of one of eight converters of "jumbo" aluminum foil produced by Reynolds and converted by its customers into florist foil. The cost of the "jumbo" foil was 70 percent of the cost to the converters. The converter acquired by Reynolds had 33% of the florist foil retail sales market, and its seven competitors shared the balance. Judge Burger stated that the anticompetitive effect of the Reynolds acquisition was "obvious" (309 F.2d 229-230), adding:

> "***Arrow's assimilation into Reynolds enormous capital structure gave Arrow an immediate advantage over its competitors***. The power of the 'deep pocket' or 'rich parent' for one of the foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility of power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition.***"

The evidence in the present case shows that the Dodge DE program was regularly operated at a loss nationally, regionally and in the very market in which the plaintiff was obliged to compete; at the same time, Chrysler, over a seven year period, acquired direct or indirect control of 36% of new Dodge sales nationally and 42.5% of such sales in Southern New Jersey. These percentages are substantially higher than those branded as dangerously anticompetitive in *Reynolds,* and Chrysler's actual and multiple abuses of the "deep pocket" to achieve such penetration are equally well documented.

The decision of the court of appeals in the present case is also inconsistent with the interpretation placed upon the antitrust laws in this area by other courts of appeals.

Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970), involved an action by a distributor of sealants against the manufacturer of the dominant line of products in that market. That manufacturer, like Eastman Kodak, began to bypass the plaintiff and sell directly to plaintiff's customers at the same or lower prices than it sold to its distributor. Plaintiff sued, charging violations of Sections 1 and 2 of the Sherman Act and also of the Robinson-Patman Act. Citing the alleged absence of any public injury, the district court granted summary judgment. The Court of Appeals for the Ninth Circuit reversed, stating (at p. 1342):

> "•••the affidavits•••would sustain the cause of action for conspiracy. The restraint of trade is the effect on competition in Presstite products which are admittedly the dominant line of products. First, the general public is damaged by being deprived of an independent distributor, who may handle competing products, thus giving the customer a ready comparison and a less biased assessment of each product. Second, an elimination of the major independent distributor would give Presstite even more power to control prices including those charged by the few remaining small distributors."

See also *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79 (6th Cir. 1966), *cert. denied*, 393 U.S. 844 (1976). There, independent sellers and installers of gas equipment and appliances sued a public utility, complaining that the latter had violated the antitrust laws by selling and installing gas appliances to consumers at or below cost. The utility claimed that it made a profit on 90% of its sales, "aside from promotional expenses," and, in any event, was attempting by its conduct to increase the number of gas users in competition with TVA, which was encouraging the public

to use electric power. The district court entered summary judgment for the defendant, but the Court of Appeals for the Sixth Circuit reversed, holding that the case presented questions under the antitrust laws for resolution by a jury. Thereafter, this Court denied certiorari.

Finally, the *Glauser* decision is directly inconsistent with six opinions of the Court of Appeals for the Third Circuit and the district courts of that Circuit in other cases involving complaints by private capital dealers against automobile manufacturers arising from the operations of factory-controlled dealers. Those cases, however, are discussed in the next section, where we believe they have greater significance.

II. This Decision Is Indicative of a Long Standing Aversion of the Court of Appeals For the Third Circuit to Private Enforcement of the Antitrust Laws.

The antitrust laws represent a long standing and highly significant statement of government policy by the people of the United States and English-speaking peoples generally.[10] Furthermore, where in the past a ruling by a court of appeals "••• seems to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States," this Court has granted certiorari. *Perma Life Mufflers, Inc. v. Intern'l Parts Corp.*, 392 U.S. 134, 136 (1968).[11]

The present importance of private actions to the effective enforcement of the antitrust laws is apparent from the sta-

10. See *Mitchell v. Reynolds*, 88 Eng. Rep. 610 (1712) and *Nordenfelt v. Nordenfelt Co.*, (1894) A. C. See also Stickells, Legal Control of Business Practices 12-13 (1965); *Orbo Theatre Corp. v. Loew's Inc.* 156 F. Supp. 770-774 (D. D. C. 1957), *aff'd*, 261 F. 2d. 380 (D. C. Cir. 1958), *cert. denied*. 359 U. S. 943 (1959), and *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898) *aff'd*. 175 U. S. 211 (1899).

11. See also *Klor's Inc. v. Broadway Hale Stores, Inc.*, 359 U. S. 207 and 705 (1959), in which the Solicitor General of the United States supported the grant of certiorari on a petition filed on behalf of a small retail appliance store; the Solicitor General also supported reversal on the merits.

tistics on pages 99-100 and A20-24 of the 1977 Annual Report of the Administrative Office of the United States Courts. For the statistical year 1977, of 1689 civil and criminal antitrust cases commenced, 1611 were private cases. For the statistical year 1976, of 1574 civil and criminal antitrust cases commenced, 1504 were private cases. At the year end, 1977, there were 3029 private antitrust cases pending and untried in the district courts, as contrasted with 113 cases to which the United States was a party. Furthermore, a review of the Administrator's 1977 year end printout shows that 82 private antitrust cases pendings at that time involved manufacturers of motor vehicles, and that these included 18 cases in which Chrysler Corporation was named as a defendant, 11 cases naming General Motors and 9 cases naming Ford.

The Administrator's 1977 Report (at pp. 99-100) also states that, of all private antitrust cases filed during the court year and pending at year end, one-third were filed or pending in five district courts, one of them (in Philadelphia) under the jurisdiction of the Court of Appeals for the Third Circuit, whose decision we ask be reviewed here.

Finally, a review of the decisions of that court in the antitrust field over the past fifteen years establishes that, notwithstanding the existence of not infrequent instances in which that court has reversed summary judgments in favor of defendants on the ground that a trial of the merits was required, not a single dollar verdict in favor of an antitrust plaintiff has remained unscathed; all have been set aside, reduced substantially, or been the victims of judgments N.O.V.

Specifically, in *Mt. Lebanon Motors, Inc. v. Chrysler Corporation,* 417 F.2d 622 (1969), a jury concluded that Chrysler violated Section 1 of the Act in administering its factory-controlled dealer program in Pittsburgh, but declined to award plaintiff damages. The court of appeals affirmed. In *Rea v. Ford Motor Company,* 497 F.2d 577 (1974), *supra,* the court of appeals entered judgment for the defendant N.O.V. after a jury awarded plaintiff $3,350,000. In *DeFilippo v. Ford Motor Company,* 516 F.2d 1313 (1975), the

court of appeals entered judgment for the defendant N.O.V. after a plaintiff recovered judgment for $2,240,000 plus attorneys fees of $384,000. In *American Motors Inns v. Holiday Inns Inc.,* 521 F.2d 1230 (1975), the court of appeals, while agreeing that the record supported a district court judgment to the effect that one type of conduct engaged in by the defendant violated the Act, set aside a stipulated damage award of $4,000,000 plus attorneys' fees and costs on the ground that a new trial was required with respect to another type of conduct on which the judgment was based. In *NBO Industries Treadway Companies, Inc. v. Brunswick Corp.,* 523 F.2d 262 (1975), the court of appeals awarded a new trial after plaintiff recovered a judgment of $7,074,000. Thereafter, this Court granted certiorari and entered judgment for the defendant N.O.V., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 97 S.Ct. 690 (1977). In *Coleman Motor Co. v. Chrysler Corp.,* 525 F.2d 1338 (1975), the court of appeals set aside a judgment of $900,000 and directed a new trial as to both liability and damages. In *Baughman v. Cooper-Jarrett, Inc.,* 530 F.2d 529 (1976), the court of appeals affirmed a trial court in reducing a plaintiff's antitrust award from $60,000 trebled, to $30,600, trebled. In *Pitchford v. Pepi, Inc.,* 531 F.2d 92, *cert. denied,* 96 S.Ct. 2649 (1976), the court of appeals set aside a judgment of $1,475,000 plus counsel fees and directed a new trial as to damages and an additional hearing with respect to the fees of plaintiff's counsel. In *Martin B. Glauser Dodge Co. v. Chrysler Corporation, et al,* — F.2d — (1977), the present case, the court of appeals entered judgment for the defendant after plaintiff secured a judgment for $3,900,000 plus counsel fees; in the same opinion (App. A36), the court expressed sentiments indicating its approval of a district court decision, as yet unreported, entering judgment N.O.V. for the defendant in the case of a dealer complaining of the actions of Chrysler's factory-controlled dealers in Philadelphia. *Elfman Motors, Inc. v. Chrysler Corp.,* No. 72-12802 (E.D. Pa. August 9, 1977).

During the same period, the court of appeals rendered several other decisions of significance here. In *Three Rivers Motor Company v. Ford Motor Company,* 522 F. 2d 885 (1975), the court accepted an interlocutory appeal and dismissed a dealer's antitrust action against Ford for the reason that, when the dealer surrendered his franchise, he executed a release of all claims against Ford. The execution of such a release is required before a manufacturer will purchase at cost a liquidating dealer's inventory of unused parts, accessories and equipment.[12] In *Three Rivers,* the court of appeals enforced the release notwithstanding a claim that it was executed under economic duress. The court rejected that contention on the ground that the plaintiff was advised by counsel at the time the release was executed and, allegedly, that fact alone barred the defense of economic duress under Pennsylvania law. In this connection, the court failed to follow the most recent Pennsylvania appellate case on the subject, *Bernard Litten v. Jonathan Logan,* 220 Pa. Superior Ct. 274, 286 A. 2d 913 (1975), in which the Pennsylvania court held to the contrary and refused to follow an earlier decision on which the Court of Appeals chose to rely in *Three Rivers.*

In *Lindy Bros. Builders, Inc. v. Phila. v. Am. Radiator & Sanitary Corp.,* 487 F. 2d 161 (1973), the court of appeals severely limited the method by which counsel fees would be computed for attorneys who succeeded in effecting a settlement on behalf of a class of antitrust claimants, and in *Merola v. Atlantic Richfield Company,* 494 F. 2d 292 (1974), the court held that the *Lindy* standards would apply even in instances where a contingent fee agreement purported to define the fee which the plaintiff would pay its counsel in the event his efforts were successful.

In the present case, the court of appeals set aside a jury's findings and entered judgments for the defendants N.O.V. even though (a) this case was competently tried

12. Glauser Dodge's refusal to execute such a release caused it to sustain a loss of $30,000 on the liquidation of its inventory.

by experienced counsel; (b) before the senior district judge in New Jersey; (c) factually, the jury's verdict was based primarily on the testimony of Chrysler witnesses and Chrysler documents; (d) the verdict was also supported by the opinions of a well known and highly qualified expert who has been consulted on occasion by the Antitrust Division of the United States Department of Justice; (e) on the law, the verdict was supported not only by the opinion of the distinguished district judge, but by comments adverse to the propriety under the antitrust laws of the very marketing system complained of in opinions rendered by a majority of the judges in this court of appeals and by five district judges within its jurisdiction.

Let us review those cases.

In *Mt. Lebanon Motors, Inc. v. Chrysler Corp.,* 283 F. Supp. 453 (1968), the District Court for the Western District of Pennsylvania considered the same Dodge DE dealer system which was the object of plaintiff's complaint in the present case. Citing in particular now Chief Justice Burger's decision in *Reynolds Metal Co. v. F.T.C.,* 309 F. 2d 233 (1962), *supra,* that court stated of Chrysler's practices (at p. 457):

> "***there were arguable antitrust questions with respect to whether the degree of forward integration being practiced by the manufacturer in competing with its own customers was permissible or impermissible, and whether the manner in which such competition was carried on constituted by price cutting to eliminate competition, with losses being subsidized by adventitious advantages unrelated to the competitive merits of the respective contestants in the particular market."

In *Rea v. Ford Motor Co.,* 355 F. Supp. 842 (W.D. Pa. 1973), another district judge in Pittsburgh entered judgment on a jury verdict adverse to Ford Motor Company in a case involving the implementation of its manufacturer—financed dealer program, stating (at p. 865):

> "Ford Motor Company, by operating factory stores and dealer development stores which were under its domination, was in competition with its own dealers. Therefore, when it adopted a course of action in combination with such stores to drive any of these independent dealers out of business or to dominate the market, it was certainly engaged in a combination or conspiracy in restraint of trade under the Sherman Act. See *United States v. McKesson and Robbins, Inc.*, 351 U.S. 305 (1956)."

The Court of Appeals for the Third Circuit set aside the *Rea* verdict on other grounds, but it did not disturb the above analysis; rather, the court stated specifically that its "decision *** in no way undermines the proposition that automobile manufacturers are subject to the strictures of the antitrust laws in the operation of their wholly owned outlets." *Rea v. Ford Motor Co., supra,* 497 F. 2d at 590.

In *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (1975), the Court of Appeals for the Third Circuit reviewed some of the features of the Dodge DE program attacked in *Mt. Lebanon Motors* and in the present case and concluded, once again, as had a third district judge in the court below (376 F. Supp. 546 (W.D. Pa. 1974)), that a proper basis in fact and law existed for a jury's determination that two of the defendants in the present case had combined and conspired with managers of factory controlled dealerships in Pittsburgh and had been guilty of predatory conduct in violation of Section 1 of the Sherman Act by causing or permitting those dealerships to operate at a loss, subsidizing those losses, subsidizing advertising expenses, and then, after plaintiff's competing private capital dealership was destroyed, reducing advertising expenses.[13]

Plaintiff's evidence in the present case was far more extensive and detailed than that tendered in *Mt. Lebanon, Rea*

13. The Court of Appeals said (525 F. 2d. 1348): "***If Chrysler deemed additional dealerships necessary for effective competition with other manufacturers, it was free to establish them on non-discriminatory terms."

and *Coleman;* furthermore, the evidence here pertained also to the operations of three sister subsidiaries, Chrysler Financial Corporation, Chrysler Credit Corporation, and Chrysler Realty Corporation and a large group of factory-controlled dealerships in metropolitan Philadelphia and South Jersey. Thus, the Third Circuit's decision of November 14, 1977, acquitted of culpability, as a matter of law, the very same system and practices which, on three previous occasions, that court had ruled, as a matter of law, were a proper subject for jury determination of antitrust liability, and which the jury in this case had specifically determined did restrain trade unreasonably.

Significant, too, of the attitude of the Court of Appeals for the Third Circuit in these cases is the fact that the justification given by the court for entering judgment, namely, that there was no evidence here of forward integration nor proof that Chrysler and its subsidiaries ever intended to destroy Glauser Dodge, was so far fetched that not even the very well counseled defendants had moved for a directed verdict, sought judgment N.O.V. in the trial court, or briefed or argued on appeal on any such grounds. *Cf.* Fed. R. Civ. P. 50 (a) and (b) and the decisions interpreting those provisions collated in 5A *Moore's Federal Practice* 50-50, fn. 5.

Most significant of all in this connection is the fact that the errors and evidentiary distortions in the Third Circuit's opinion were clear and included the following:

(a) The opinion erred in stating that there was no evidence that the conduct complained of by the plaintiff resulted in "forward vertical integration" (App. A57), *i.e.*, concentrating sales of Dodge products in the hands of Chrysler-controlled dealerships (App. A57). Plaintiff's highly qualified economist and antitrust expert, Dr. Kuehn, testified, in answer to hypothetical questions based on the evidence with respect to the operating results of Dodge DE dealers nationally and locally, as well as the operating results of Chrysler Credit and Chrysler Realty, that private capital dealers obliged to compete with Dodge DE

dealers subsidized by Chrysler Motors, Chrysler Credit and Chrysler Realty would have a very difficult time doing so. Glauser Dodge produced detailed evidence (see pp. 15-20, *supra*) with respect to the effects of the combined actions of the Chrysler defendants and their factory dealers on its business and those of other private capital dealers. That evidence included testimony by the principal of another South Jersey Dodge private capital dealer whose business was destroyed by the same conspiracy during the same period as plaintiffs. Also "overlooked" in the court of appeals' opinion was evidence that, as of 1969, there were four private dealers in the City of Philadelphia, but by the time of trial, there were only two private capital dealers left.[14] Evidence also showed that, in 1964, there were private capital Dodge dealers at 33 points in Southern New Jersey, but by 1972, eleven of these points were open; meanwhile, the percentage of South Jersey sales made by the Dodge DE dealers of former Dodge DE dealers operating in Chrysler-subsidized facilities had increased from 20 percent in 1964 (there was none prior to 1973) to 42.5 percent in 1972.

(b) the court of appeals' opinion incorrectly states (App. A57) that there was no evidence which would have justified a jury in concluding that the defendants ever intended to put Glauser Dodge out of business. Clearly, however, the proof sustained a contrary conclusion. *See*, in this connection, the facts summarized at pp. 18-20 *supra*. *Cf.* the facts in *Eastman Co. v. Southern Photo Co.* and *Poller v. Columbia Broadcasting Systems*, discussed at pages 27-28, *supra*.

(c) The court of appeals attempted to distinguish this case from its own decision in *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (1975), *supra*, by stating that the *Coleman* complaint charged the Chrysler defendants with

14. Notwithstanding that, the court did consider post-complaint evidence which was favorable to the defendants (App. A43).

attempting to monopolize a retail Dodge market and implying that the *Glauser* complaint included no such allegations (App. A54). This is not so.

(d) The court of appeals cited (App. A56) *England v. Chrysler*, 493 F.2d 269 (9th Cir. 1974), for the proposition that the plaintiff in a case such as this must prove that the defendant's conduct "was deliberate". This Court held to the contrary in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 375 (1967), and the court of appeals had so noted in *Coleman* (525 F.2d 1345, fn. 10). Also, a comparison of the facts in *England* with plaintiff's evidence here establishes that the cases are clearly distinguishable on their facts. However, even if the statements made in *England* were correct, imposition of that standard poses no problem for Glauser Dodge. All of the acts complained of by Glauser Dodge were deliberate, and the charts reflecting the results, nationally and locally, of the DE Program and of Chrysler Financial and Chrysler Realty, viewed in the context of the Quinn Memorandum, reflect a deliberate course of action. All of the discriminations of which the plaintiff here complained were deliberate. Furthermore, Chrysler's Dealer Trend Records showed very clearly that Chrysler management was always aware of the effects the pricing and advertising programs of its dealers were having on competing private capital dealers. Finally, even in *England*, the court stated, citing *Rea*, *supra*, "It may well be that the predominant emphasis on market penetration, which results in the deliberately reckless operation of a subsidized dealer and which has the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level, could, if proved, constitute an unreasonable restraint of trade" (493 F.2d at 273).

(e) The court of appeals' opinion suggests (App. A59) that Glauser Dodge would have had no cause for complaint if the DE dealers had obtained the type of discriminatory support of which plaintiff complains from sources not affiliated with Chrysler. This suggestion is a non-sequitur, because the evidence shows that Chrysler supported its fac-

tory dealers in this manner because private sources would not do so (App. A40).

(f) The court of appeals attempted to justify Chrysler's conduct while Glauser Dodge was in business by reciting circumstances which did not exist during that period. For example, as evidence of the alleged success of the DE program in establishing new dealerships, the Court referred to what happened to the South Jersey DE's *between 1972 and 1974*, years after Glauser's business had been destroyed (App. A43). More important still, the court described at some length the background of the Dealer Enterprise Program as conceived by its author *in 1961* (App. A36-A40). The court failed to perceive that the conduct complained of by Glauser Dodge took place *in 1964 and thereafter;* that the great bulk of plaintiff's damages resulted from the defendants' actions in 1969-1970; and that Chrysler's unused manufacturing capacity and diminished profits which produced the DE program in 1961 no longer existed in later years. Specifically, in 1961, when the DE program was devised pursuant to the Quinn Memorandum cited by the panel, Chrysler's unit sales were 892,000 [15] its productive capacity was 1.3 million units, and its profits were $65 Million. Thereafter, unit sales increased consistently to 2,263,000 in 1968 and earnings increased to $291 Million in that year (App. A5). Accordingly, there was never a time while Glauser was in business when Chrysler could justify its DE program on the basis cited by the Court of Appeals.

(g) The court of appeals (App. A43, A55) erred in its statements with respect to the results, as distinguished from the stated purpose, of the DE program. Through 1970, only 122 out of 508 Dodge DE dealers bought out, while 131 DE dealers were liquidated. Furthermore, contrary to several statements in the opinion (App. 43), *there was no evidence whatever that profits derived from any*

15. The Court of Appeals opinion (App. A39) states that Chrysler's unit sales in 1961 were 311,899; actually, that was the figure for the first six months of 1961.

DE dealership were ever sufficient to permit a DE manager to buy out Chrysler by repaying Chrysler for its entire investment. Specific evidence establishes, contrary to a statement in the opinion (App. A43), that none of the DE managers in New Jersey with whom Glauser competed ever succeeded in doing this. There was evidence that, in the four years *after* Glauser was put out of business and its share of the market absorbed by competing DE dealers, the managers of each of those three dealerships did buy the stock in their dealerships, *but not out of profits.* The evidence also showed that these dealers still operated in Chrysler-subsidized facilities under leases conditioned on their remaining Dodge dealers.

The jury could also have concluded from the evidence that Chrysler's plan was to use such dealerships to drive down the retail price of the Dodge automobiles in a particular area, and thereby make "conquest sales" to customers who previously had purchased products of other manufacturers. Once such sales were made—at the expense of operating losses or minimal profits by the factory-controlled dealers, Chrysler Realty, Chrysler Financial, and Chrysler Credit, as well as the private capital dealers, Chrysler wished to withdraw *direct involvement* in the marketplace to avoid antitrust consequences, secure in the knowledge that Dodge enjoyed a "loyalty rate" (repeat sales) of 50 to 75 percent. Chrysler recouped retail level losses on the conquest sales because increased production lowered unit costs. But private dealers such as Glauser Dodge could not benefit from this alternative source of profits. The statistics showed that, ultimately and as a consequence, and as Dr. Kuehn predicted, the private dealers who survived did so only with much lower profits, and were eventually destroyed.

(h) The court of appeals recognized, though it materially understated (*Cf.* App. A46-A47 and pages 15-20 *supra*), the defendants' discriminations against Glauser Dodge and in favor of the competing DE dealers, but erred in implying (App. A47) that such discriminations were contemplated by the Quinn Memorandum. On the contrary, both

the Quinn Memorandum and Chrysler's chief executive stated that it was always contemplated (as dictated by antitrust law precedents such as those cited in this Petition) that the various Chrysler subsidiaries would *not* discriminate in favor of factory-controlled stores at the expense of competing private capital dealers.

(i) Here, there was ample evidence that the Chrysler defendants abused their "deep pockets" and that plaintiff was injured as a direct consequence. *Cf Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 698 (1977), *rev'g.* 523 F. 2d 262, 273 (3rd Cir. 1975). The court of appeals refers to, but errs in characterizing as "start-up losses" (App. A47), the losses for the various DE dealers in Southern New Jersey and Philadelphia absorbed by the Chrysler defendants. Quinn had suggested that "launching costs of $50,000 each might be required for 50 percent" of the DE dealers. Compare that with the national, regional, and South Jersey figures for Dodge DE dealers shown in the schedules printed in the Appendix (at A1 to A5). Certainly, these figures justified the jury's conclusions that the repeated losses of the DE dealers in that region, which were in most instances covered at once by Chrysler Motors' new capital contributions, were not these figures are not truly representative of the losses which the Chrysler coterie sustained in that connection, because they do not reflect the loss of income on additions to the original capital made by Chrysler to cover previous years' losses, nor do they reflect other subsidies which the DE dealers received from other Chrysler defendants.

Even more shocking are the loss figures pertaining to Chrysler Financial Corporation and Chrysler Realty Corporation (App. A5-A6).

(j) The court of appeals understated materially plaintiff's evidence with respect to the nature and extent of the price-cutting engaged in by the DE dealers with which Glauser Dodge competed. Compare App. (A47) with the facts set forth on pages 15 and 16 of this petition.

(k) Finally, it must be noted, each and every error or oversight on the part of the particular panel which heard this case was called to the attention of the entire court of appeals by a timely petition for rehearing. Nevertheless, that court rejected the petition without even requiring the defendants to answer.

Obviously, this attitude of the court is severely limiting effective enforcement of the antitrust laws in an industry and in a region where effective enforcement must be a priority item.

III. The Court of Appeals Erred In Reviewing Plaintiff's Evidence as to Damages and In a Manner Which, if Not Corrected, Is Likely to Have Substantial Significance In Many Cases of This Kind.

This point is a cautionary one, dealing with an issue of damages which the court of appeals alluded to peripherally in entering judgment for the defendants. We discuss it very briefly only because it may have relevance if the Court determines to reverse the court of appeals but questions whether it should do so outright or remand for that court's consideration of other issues.

Of the damages sought by Glauser Dodge, approximately $320,000 consisted of subsidies, computed in terms of vehicle sales, which plaintiff did not receive but which the evidence showed were received by the DE dealerships with which plaintiff competed. These subsidies were computed by plaintiff's expert, Dr. Kuehn, who also testified, in answer to hypothetical questions, that they constituted a proper and conservative method of estimating the losses which plaintiff sustained in this area.[16]

16. The remaining elements in plaintiff's damage claim consisted of the dimunition in the value of its single purpose real estate facility as a result of destruction of its business, which dimunition was stipulated to be $336,000; a diminution in the value of plaintiff's inventory resulting from the destruction of its business, which the uncontradicted evidence established to be $30,000; $225,000 in losses from repossessions, interest lost on reserves for repossessions, and interest paid on

In one of the prior cases in this field, *Rea v. Ford Motor Co.*, 497 F. 2d 577 (1974), *supra*, the Court of Appeals entered judgment N.O.V. after a Ford dealer recovered a verdict under the antitrust laws against Ford Motor Company, on the ground that the plaintiff's proof of damages consisted solely of proof of subsidies which Ford Motor Company paid its factory owned dealer and the plaintiff's counsel deliberately refrained from producing proof of whether or to what extent plaintiff was actually injured as a result of such subsidies.

In the present case, however, as Judge Cohen noted in his opinion (App. A25-A26), Glauser Dodge offered proof that its prices were controlled by the DE dealers. Accordingly, a conservative method of approximating the damages which Glauser Dodge sustained as a result of the subsidies was to award plaintiff sums which, on a per car sold basis, equalled the subsidies which the evidence showed the competing DEs received from Chrysler. As the trial court noted (App. A26), "Glauser's profit margin was decreased to the extent its competitors were illegally favored." Notwithstanding, without discussion or explanation, the court of appeals stated (App. A59): "To the extent that Glauser Dodge claims an injury based solely on the loss subsidy theory, its claim is clearly foreclosed by our decision in *Rea v. Ford Motor Co.*, ***".

Rea, then, is clearly distinguishable on its facts from the present case. On the other hand, Judge Cohen's approval of the damage award here was squarely in accord with this Court's holdings in *Hanover Shoes v. United States Machinery Corp.*, 392 U.S. 481, 489 (1968), and *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

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16. (Cont'd.)
short term borrowings, from all of which the uncontradicted evidence showed that Chrysler Credit relieved the competing DE dealers; and the destruction of plaintiff's business as a going concern, as to which estimates were produced ranging from $340,000 to $905,000, and the jury awarded approximately $420,000.

Since damages attributable to subsidies paid factory controlled competitors are a vital part of the recovery sought in cases such as this—of which the Court Administrators's records show that a substantial number, and in the auto industry alone, are now pending. This, too, is an important question of federal law which should be correctly answered by this Court.

CONCLUSION.

For the reasons stated above, this petition for certiorari should be granted.

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STATUTORY APPENDIX.

This case involves §1 of the Sherman Antitrust Act, 26 Stat. 209 as amended by 50 Stat. 693 and 69 Stat. 282, 15 U.S.C. §1, and §4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §15, which provide in pertinent part:

Sherman Antitrust Act

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ***."

Clayton Act

§15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."